No. 12,062

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT H. GAULDEN,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY and
PACIFIC FRUIT EXPRESS COMPANY,
Appellees.

Appeal from Order Dismissing Action by the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

DANIEL V. RYAN,
Phelan Building, San Francisco 3,
THOMAS C. RYAN,
RYAN & RYAN,
Phelan Building, San Francisco 3,
Attorneys for Appellant.

Subject Index

Table of Authorities Cited

Cases

Statutes

Textbooks

No. 12,062

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT H. GAULDEN,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY and
PACIFIC FRUIT EXPRESS COMPANY,
Appellees.

Appeal from Order Dismissing Action by the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

The United States District Court dismissed the action herein for want of jurisdiction.

Appellant contends that the District Court does have jurisdiction and that for the purpose of this action both appellees are common carriers by railroad engaged in interstate commerce under the provisions of the Federal Employer's Liability Act, 45 U.S.C.A., 51.

Appellate jurisdiction of the Court is predicated upon United States Code Annotated, Title 28, Section 225.

The complaint (Tr. of Record, p. 2) alleges the appellant had his leg cut off in an accident while he was employed by either or both appellees at Bakersfield, California on June 7, 1946 through the negligence of either or both appellees.

The complaint further alleges that both appellees at the time of the injury to appellant were common carriers by Railroad and then engaged in interstate commerce and that appellant's injury was incurred in interstate commerce and that the cause of action was brought under the Federal Employer's Liability Act, 45 U.S.C.A., Section 51. The complaint further alleges that appellee, Pacific Fruit Express Company, is and was owned by appellee, Southern Pacific Company and that at all times mentioned there existed between appellee, Southern Pacific Company, and appellee, Pacific Fruit Express Company, an Agency Contract (Tr. of Record, p. 54) providing that appellee, Pacific Fruit Express Company, act as agent for appellee, Southern Pacific Company, in icing railroad cars used in interstate commerce for and on behalf of appellee, Southern Pacific Company, and that appellee, Pacific Fruit Express Company, was at the time of the injury to appellant engaged in a joint enterprise with appellee, Southern Pacific Company, for their joint benefit and in the furtherance of interstate commerce. The complaint further alleges that appel-

lant after unloading ice was aiding in moving an empty refrigerator car and that the wheels of a loaded car, which was being drawn up to the icing platform by a cable and winch, struck and injured him.

The parties have stipulated that upon the pleadings and the stipuation at pre-trial conference (Tr. of Record p. 19) and the attached statements of fact (Subject to the reservation of objections stated in Paragraph V of said stipulation i.e. the reservation of objection is to the substance of the matter stated) that the Court should decide at pre-trial conference whether appellant at the time of his injury was an employee of a common carrier by Railroad within the Federal Employer's Liability Act. It should be noted that this appellant has not stipulated to the facts in the narrative statements but merely that such narraive statements should be deemed as answers to appellant's interrogatories. Appellant further admits that he received wages from the appellee, Pacific Fruit Express Company.

THE FACTS.

Appellant at the time of his accident was employed and received a salary as an iceman in the icing yard owned and operated by the appellee, Pacific Fruit Ex-Press Company, at Bakersfield, California. After unloading ice from a refrigerator car and while aiding in moving an empty car from a loading platform, the wheels of a loaded car, which was being drawn up to

the platform by a cable and winch, ran over and severed his right leg.

Appellee, Pacific Fruit Express Company, is in the business of giving refrigeration service to carriers by rail and has icing plants and owns its own cars. Pacific Fruit Express Company is owned fifty per cent by appellee, Southern Pacific Company, and fifty per cent by Union Pacific Railroad Company.

At the time of the injury to appellant, the appellee, Pacific Fruit Express Company, had an arrangement by written contract (Tr. of Record p. 54) with the appellee, Southern Pacific Company, a carrier by railroad and the Union Pacific Company, which contract by its terms made the appellee, Pacific Fruit Express Company, the agent for the purpose of refrigeration service of the railroad on whose line the service was done and which gave the appellee the right to control the manner in which the work was to be done. This contract in the case at bar has applicability only as between both appellees here. In answer to appellant's interrogatories, appellee, Pacific Fruit Express Company, admitted: (Tr. of Record p. 51) "It is a fact that the icing service rendered by P. F. E. under its protective service contract of July 1, 1942, between it and S. P. and U. P. applied only to S. P. in regard to the service under said contract by P. F. E. at Bakersfield on June 7, 1946 at the time of the accident to plaintiff herein." The answer to this interrogatory then states that Pacific Fruit Express also rendered icing services to others as well. Appellant

contends that the contract between the appellees gives the appellee, Southern Pacific Company, the right to control the manner in which the services are to be done in that it provides that: (Tr. of Record p. 59, Paragraph 8) "In the performance of such service, the orders of the system on whose tracks loading, unloading or movement takes place shall be promptly and strictly obeyed by the Car Line" and in Paragraph 7 of the contract (Tr. of Record p. 59) it states: "The Car Line will * * * upon request of the Railroads * * * perform such other services as may be required by the Railroads in regard to the preparation and publication of such tariffs".

The Contract explicitly provides in Paragraphs 1 and 2 (Tr. of Record p. 57) that "The Car Line shall undertake as the agent of the Railroads all the services necessary to the effective refrigeration" and "The Car Line agrees, as agent for the Railroads, to furnish ice necessary for the protection of all perishable freight handled by its Railroads".

STATEMENT OF THE CASE.

Appellant received his salary from the appellee, Pacific Fruit Express Company. He was injured in a manual movement of a refrigerator car at the icing plant of the Pacific Fruit Express Company at Bakersfield, California. Pacific Fruit Express Company at the time was under contractual relationship with the appellee, Southern Pacific Company, (Tr. of

Record p. 54) wherein Pacific Fruit Express Company covenanted it was to act as agent for the appellee, Southern Pacific Company, and that Southern Pacific Company might be called on to provide the tools and some labor for the icing and refrigeration of cars, and it would obey the orders of the appellee, Southern Pacific Company, in the performance of the service called for by the contract, (Paragraph 8 of contract—Tr. of Record p. 59) and would perform such other services as may be required by the railroads (Southern Pacific Company) (Tr. of Record p. 59) in regard to the preparation and publication of tariffs.

In view of the terms of the written Agency Contract between the appellee, Southern Pacific Company, and the appellee, Pacific Fruit Express Company, appellant contends that appellee, Southern Pacific Company, had the right to control the method of icing operations provided for by the contract and thus the Pacific Fruit Express Company was the agent of the Southern Pacific Company, a common carrier by railroad, and that appellant thus comes within the provisions of the Federal Employer's Liability Act. Appellant further contents that both appellees were engaged in a joint enterprise for the mutual advantage of both and further that the contract violated Section 5 of the Federal Employer's Liability Act (45 U. S. C. A., Section 55).

Appellant further contends that the 1939 amendment to the Federal Employer's Liability Act being

remedial in purpose brings the operations of the Pacific Fruit Express Company under the definition of a "Common Carrier by Railroad" under the terms of the Act of Congress.

SPECIFICATION OF ERRORS.

1. The District Court erred in holding that the appellee, Pacific Fruit Express Company, and the appellee, Southern Pacific Company, were not employers of appellant as common carriers by Railroad under the Federal Employer's Liability Act at the time of his injury.

2. The District Court erred in holding that it did not have jurisdiction herein.

ARGUMENT.

SUMMARY OF ARGUMENT.

1. Appellant contends that the appellee, Pacific Fruit Express Company, was agent for the appellee, Southern Pacific Company, and not an independent contractor, by virtue of the written agency agreement between the appellees, and the right of control therein given appellee, Southern Pacific Company, in the manner in which the work was to be done under the contract, and furthermore by virtue of the Southern Pacific Company's right to supply labor and materials in fulfillment of the contract provisions.

2. Both appellees were engaged in a joint enterprise.

3. The agency contract is in contravention of Section 5 of the act (45 U. S. C. A. 55) as an attempt by a carrier to evade its liability under the Federal Employer's Liability Act.

4. The 1939 amendment to the Federal Employer's Liability Act being remedial and humanitarian in purpose, the Courts should construe the intent of Cangress to include the appellee, Pacific Fruit Express Company, as a "Common Carrier by Railroad" under the terms of the Act.

POINT I.

Appellant contends that the Agency Contract herein gave the appellee, Southern Pacific Company, a right to control the methods used in the refrigeration service by the appellee, Pacific Fruit Express Company, and thus the appellee, Southern Pacific Company, became the master of appellant. It is immaterial whether such control was in fact exercised or not as the authorities hold that where a party has a right of control over the manner in which work is to be done he becomes a master and not an independent contractor.

The Restatement of the Law of Agency reads as follows:

> "A master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service."

Section 2: Subsection 1—Restatement on Agency.

"A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right of control of the master."

Section 2: Subsection 2—Restatement on Agency.

"An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right of control with respect to his physical conduct in the performance of the undertaking."

Section 2: Subsection 3—Restatement of Agency.

Appellant cannot stress too strongly that he is relying herein upon the right of control given the appellee, Southern Pacific Company, by the terms of the contract. Appellant respectfully submits that the trial judge erred in referring only to an apparent lack of control exercised as distinguished from the inherent right of control over the manner in which the services were to be exercised.

In the case of *Pennsylvania R. Co. v. Roth,* 163 Fed. (2) 161 the United States Government made a contract with the Pennsylvania Railroad to provide storage yards and to furnish labor and material therefor. The railroad company in turn entered into a contract with a contractor who employed Roth, the plaintiff, to unload cars and do other work requested by the railroad incident to the contract. Roth was injured and

the Court held that the control exercised by the railroad and the control which it was given a right to exercise made it the master of the contractor's agent. It is true that in this case the Court was impressed by the actual control exercised by the Railroad but the contract there was replete, as in the case at bar, with terms giving the railroad the right to exercise control.

In the case of *Cimorelli v. New York Central R. Co.,* 148 Fed. (2) 575 the facts are analogous to the case of *Pennsylvania v. Roth* and the instant case. The Government made a contract with the railroad company for a storage and unloading yard, and the railroad then made a contract with the Duffy Co. to do the work and he was required to supply his own equipment and labor. There was a special provision in the contract that the Duffy Co. was to perform the work as an independent contractor with exclusive supervision of the manner and method of its performance, except that the work was to be satisfactory to the railroad company. The Court found that in spite of the terms of the contract the type of work required by the contract must necessarily give the railroad company the right of control and hence the injured employee of the Duffy Co. was the agent of the railroad company and that the contracting Duffy Co. was not an independent contractor.

In *Standard Oil Co. v. Anderson,* 212 U. S. 215 the Court said:

> "The master is the person in whose business he (the workman) is engaged at the time, and who has the right to control and direct his conduct."

In *Singer Manufacturing Co. v. Rahn,* 132 U. S. 518 the Court said:

> "The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words 'not only what shall be done, but how it shall be done" *Railway v. Hanning,* 15 Wall 649, 656."

In *Hardaker v. Idle Dist. Council,* 1 Queen's Bench, 353 the Court said:

> "It is the unlimited right of control, whether actually exercised or not, which, in my opinion is the condition for inferring the responsibility of a master."

The following cases also hold that in determining the distinction between an employee and an independent contractor it is not the actual exercise of control over the manner or means that governs, but the right to exercise it.

Watkins v. Thompson, 72 Fed. Supp. 953;
MacMillan v. Montecito Country Club, 65 Fed. Supp. 240;
Ryan v. Farrell, 208 Cal. 200;
Wabash v. Finnegan, 67 Fed. Supp. 94.

It is respectfully submitted that the cases cited by the Judge of the District Court in his opinion can all be distinguished from the facts in the case at bar as those cases all dealt with contracts where the railroad company had no right of control by contract but

merely a right of supervision as to results or to limited control essential to the performance of its functions as a common carrier.

This Honorable Court in analyzing the Agency Contract herein (Tr. of Record p. 54) will perceive that the agreement is replete with clauses and intendments indicating that the appellee, Southern Pacific Company, is the absolute master of the appellee, Pacific Fruit Express Company in that there existed an absolute right of control over the manner in which the contract was to be performed, that the appellee, Pacific Fruit Express Company, was obliged to obey its orders, and that equipment could be furnished by the appellee, Southern Pacific Company, and labor as well. In order to facilitate this interpretation there follows the gist of the pertinent provisions of said contract.

> Paragraph 1. Car Line, *as agent of the Railroads,* shall undertake and perform *all* the services necessary to effective refrigeration.
>
> Paragraph 2. Car Line agrees, as agent for the Railroads, to furnish ice necessary for the protection of all perishable freight.
>
> Paragraph 4. Ice at cost to peddler cars and passenger trains.
>
> Paragraph 5. Railroads shall provide car lines with ice at their icing stations or houses whenever required at cost.
>
> Paragraph 6. When Railroads furnish ice to car line at cost.

Paragraph 7. Car Line will make studies re charges, rules and regulations to be published in tariffs of Railroads, and *perform such other* services as may be *required* by the Railroads in regard to preparation and publication of such tariffs.

Paragraph 8. In the performance of the services called for by this contract the *orders* of the (RR) System on whose tracks, loading, unloading, or movement takes place shall be promptly and strictly *obeyed* by the car line.

Paragraph 9. Agents and employees of the Railroads and agents and employees of the car line shall cooperate in every reasonable way with * * * respect to business covered by this agreement.

Paragraph 10. The car line agrees when necessary to furnish the labor required to carry out the provision of this contract. The Railroads agree to have their employees acts as agents for car line in this service.

Paragraph 16. Railroads shall furnish Car Line with telegraph and telephone service over their own wires for the conduct of the business of this agreement.

Paragraph 17. Railroads shall pay the cost of installing and maintaining tracks at ice plants.

Paragraph 18. The ground shall be rented (ice plants) by the Railroads at 6% per annum of value of property—Car Line pays taxes thereon.

Paragraph 19. Car Line can have work done in any department of the Railroads at cost.

Paragraph 20. If Railroad supplies Car Line with tools, supplies or equipment, charge shall be at cost plus 5% for superintendence.

POINT 2.

Appellant further advances the theory that in view of the fact that appellee, Southern Pacific Company, owned fifty per cent of the stock of the appellee, Pacific Fruit Express Company (Tr. of Record p. 54), both appellees were at said time engaged in a joint enterprise which would make appellant the servant of both and in support thereof cites the following authorities.

Oliver v. Northern Pac. Ry. Co., 196 Fed. 432;
Copper River RR Co. v. Heney, 211 Fed. 459;
Linstead v. Chesapeake & O. R. Co., 276 U. S. 28.

In the *Oliver* case, supra, the Court said:

"It will be seen that the Railway Company was the owner of a half interest in the Pullman car upon which the deceased porter was employed, and that the deceased was employed by an association of which the Railroad Company was a part. True, the Pullman Company was the manager for the association, but in that respect it was simply an agent for the Railway Company. Stripped of matters of mere form, the Railway Company and the Pullman Company operated this car jointly for their joint benefit, and employed the porter jointly * * * Is a person employed jointly by a

> railway company and another company in the operation and management of a train an employee of the RR. Company, within the meaning of the Employer's Liability Act? In my opinion this question must be answered in the affirmative * * * If such a contract is recognized and given the effect claimed for it by the defendant, there is nothing to prevent Railway Companies from avoiding obligations imposed upon them by this or other laws of Congress * * * Persons employed as the deceased was come within the spirit of the statute and those dependent upon them for support should not be denied the protection it affords."

Appellees blow both hot and cold, for twice on matters of taxation before the Supreme Court of California, the appellee, Southern Pacific Company, has stipulated that it is the alter ego of the appellee, Pacific Fruit Express Company, and that the appellee, Pacific Fruit Express Company, is its agent in the transaction of icing refrigerator cars. In the case of *National Ice Company v. Pacific Fruit Express Company,* 11 Cal. (2) 283, decided in 1938, the Pacific Fruit Express Company took the position that it is the agent of the Southern Pacific Company and is, therefore, not subject to the California State Retail Tax. In the case of *Southern Pacific Company v. McColgan,* 68 Cal. App. (2) 48, decided in 1945, the Southern Pacific Company took the position that it owns fifty per cent (50%) of the stock of the Pacific Fruit Express Company and that the Pacific Fruit Express Company is owned by the Southern Pacific Company in order to further its transportation sys-

tem. This position was taken by the appellee, Southern Pacific Company, in order to resist taxes on its Pacific Fruit Express Company dividends. The California Court at page 80 of the decision stated:

> "An examination of the stipuation of facts relating to the businesses of the corporations whose stocks are owned by plaintiff will demonstrate that all but one or two of them are engaged in businesses related to, and most of them directly connected with, plaintiff's transportation business. Indeed, in the stipulation, they are described as "affiliated companies." All but one or two of them underlie the transportation business of plaintiff. The Pacific Fruit Express Company, from whom the major portion of the dividends were received, is directly connected with plaintiff's corporation. It is true that such relationship is based upon contract, but can we be so unrealistic as to believe that the ownership of 50 per cent of that company's stock by plaintiff, in no way connect the transportation business of plaintiff with that company?"

POINT 3.

The Agency Contract is void as being in contravention of Section 5 of the Federal Employer's Liability Act (45 U.S.C.A., Section 55) in that by its terms appellee, Southern Pacific Company, in effect evades its liability under the Federal Employer's Liability Act.

It is respectfully contended by appellant that the Court below erred in dismissing this contention of appellant with the statement that the creation of the Pacific Fruit Express Company antedated the passage

of Section 5 of the Act in 1908. This Court will note that the contract between the appellees is dated July 1, 1942 (Tr. of Record p. 54) and that the date of the contract is germane and not the date of the creation of the Pacific Fruit Express Company. The trial Court stated in its opinion that the record does not disclose any duplicitous design to accomplish evasion of the act. Appellant contends the contract in the record speaks for itself. Paragraph 11 of the contract (Tr. of Record p. 61) states: "The Car Line furthermore agrees to indemnify and save harmless the Railroads against any and all liability for accidents however caused, resulting in injuries to its officers, agents or other employees" and "The Car Line further agrees to save harmless and indemnify the Railroads against any and all such claims whatsoever, growing out of or in any wise connected with such injury or death or loss or damage to persons or property of any of its said officers, agents or other employees".

The Courts have consistently held such a contractual evading of liability void.

Erie R. Co. v. Margue, 23 Fed. (2) 664;

State v. Bates & Rogers Construction Co., 157 Pac. 482 (Wash.);

Moore v. The Industrial Commission of Ohio, 49 Ohio App. 386, 197 N. E. 404;

In the case of *Erie R. Co. v. Margue,* supra, the Court said:

> "This statute, in our opinion, applies to the contract under consideration. The only purpose there could have been, so far as we can see, for inserting into the contract the provision respect-

ing the state Compensation Act, was to substitute the liabilities of that act for those that would have otherwise existed. The liability under the state statute is more certain than at common law or under the federal act, but because of the smaller compensation given by the state act, it would be more economical, from the employer's standpoint, to operate under that act than under any other law, state or federal, that might be applicable. In these circumstances, we have no trouble in believing that the intent of this provision was to evade the force and effect of the federal act, as it was also, perhaps, the main purpose of the contract to evade other federal legislation and control."

POINT 4.

Congress by the 1939 amendment to the Federal Employer's Liability Act liberalized and broadened the scope of the Act as to what constitutes interstate commerce and it is respectfully submitted that the Act being remedial and humanitarian in nature the Courts should construe liberally the phrase "common carrier by railroad" so as to include refrigeration car service.

Dated, San Francisco,
December 20, 1948.

Respectfully submitted,

DANIEL V. RYAN,
THOMAS C. RYAN,
RYAN & RYAN,
Attorneys for Appellant.